INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
A. Introduction	2
B. The layoffs and discharges	4
C. The decisions below	9
Argument	10
Conclusion	12

CITATIONS

Cases:

National Labor Relations Board v. *Fred P. Weissman Co.*, 170 F. 2d 952, certiorari denied, 336 U.S. 972	10
National Labor Relations Board v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, certiorari granted, 317 U.S. 622, writ dismissed, 319 U.S. 776	10
National Labor Relations Board v. *Hudson Motor Car Co.*, 128 F. 2d 528	10
National Labor Relations Board v. *Newton*, 214 F. 2d 472	10
National Labor Relations Board v. *P. R. Mallory & Co.*, 237 F. 2d 437	11, 12
Porto Mills, Inc., 149 NLRB 1454	11, 12
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	11

230-580—66——1

Statute:

	Page
National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.*):	
Section 2(11)	4
Section 8(a)(1)	3
Section 8(a)(2)	3
Section 8(a)(3)	3

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 427

BREWTON FASHIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 361 F. 2d 8. The Board's decision and order (R. 250–260, 117–203)[1] are reported at 145 NLRB 99.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1966 (Pet. App. 2a). The petition for a writ of certiorari was filed on August 8, 1966. The

[1] "R." refers to the volume of formal papers printed for use of the court below. "J.A." refers to the portions of the testimony and exhibits printed as a joint appendix to the parties' briefs.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer violated Section 8(a)(3) and (1) of the National Labor Relations Act by sanctioning the forcible expulsion of a group of employees from his plant because of their support of a union he disfavored.

STATEMENT

A. INTRODUCTION

Petitioner ("the Company") is a subsidiary of Judy Bond, Inc., a seller of ladies' blouses. Prior to the Company's formation, practically all Judy Bond blouses had been made by contractors in New York, which were organized by the International Ladies Garment Workers' Union ("ILG") under a master contract with the National Association of Blouse Manufacturers. In the Fall of 1961, Judy Bond resigned from the Association and began negotiating with the ILG separately, but the parties were unable to reach an agreement (R. 120–121; J.A. 374–375, 378–379). In December 1961, Judy Bond formed the Company, which, one month later, purchased the Brewton Manufacturing Company in Alabama and

commenced to manufacture blouses for Judy Bond with Brewton's existing equipment, management and employees (R. 121; J.A. 351). On January 10 and 11, 1962, the Company negotiated a new contract with the United Garment Workers of America, Local Union 422 ("UGW"), which had represented Brewton's employees since 1957 (R. 121–122; J.A. 353, 355–359).

The ILG regarded the Company as a "runaway shop" and began an organizational campaign at its plant and warehouse during the latter part of January 1962 (R. 131–133; J.A. 390–392, 611). Between February and May, several employees made known their preference for the ILG rather than the UGW. In response to this activity, the Company interrogated the ILG adherents concerning their union activities and threatened them with reprisal, promulgated and enforced no-solicitation rules which discriminated against the ILG, and banned the wearing of ILG buttons. The Board found that, by this conduct, the Company interfered with its employees' organizational rights, in violation of Section 8(a)(1) of the Act (R. 178–180, 254–255). The Board further found that the Company had assisted the UGW, in violation of Section 8(a)(2) of the Act (R. 183–184, 255–256). The court of appeals sustained these findings (Pet. App. 6a–9a, 16a–18a), and they are not challenged here. The only challenge is to the Board's further finding that the Company, in violation of Section 8(a)(3) and (1) of the Act, laid off or discharged ten employees because of their adherence to the ILG.

B. THE LAYOFFS AND DISCHARGES

On May 23, 1962, Fay Madden and Lynn Estes reported to work wearing ILG buttons. While several women employees held Madden, another employee removed the pin and threw it away (R. 142–143; J.A. 269, 417, 458–459). When Madden returned wearing another pin the employees again forcibly removed it, tearing Madden's dress in the process (R. 143, 253, n. 2; J.A. 270, 96, 191–192, 218, 224–225, 333, 418–419, 458–459, 629–630). Foreman Eskridge stood nearby watching the disturbance, but did nothing (R. 143; J.A. 192), and Floorlady Gandy[2] ran into a foreman's office and exclaimed "They've got the pin off her!" Gandy added that she "would stomp [Madden] in the floor!" and that she hoped "they would run her butt out!" (R. 143; J.A. 192, 269, 333). Plant Manager Byrd then arrived, reprimanded Madden for wearing the button in the plant, and sent her home until the other women "cooled off" (R. 143–144; J.A. 271, 630–632). Later that morning, Byrd called Estes into his office and told him that he would be discharged if he wore an ILG pin in the plant again (R. 144; J.A. 253). Several hours later, Company Vice-President Rothenberg, speaking over the plant's public address system, told the employees that "[t]he I.L.G.W.U. does not belong here and we will not tolerate any action which might create dis-

[2] The court below sustained the Board's finding (R. 126–128) that Foreman Eskridge and the floorladies were supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11) (Pet. App. 6a).

sentions and disturbances in the plant. We are very gratified by the loyalty most of you have shown to the Company * * *" (R. 144–145, 253; J.A. 362, 720).

Shortly after 1 p.m. that same day, a group of male employees forcibly ejected Estes from the plant for having worn an ILG pin (R. 145–146; J.A. 98–99, 120, 148, 193–194, 225–226, 253–254, 334, 461–462, 508–509). At the same time, a number of female employees, including Mary Braddick, forced ILG adherents Jones, West, Bell, and Chavers to leave the plant (R. 146; J.A. 99, 149–150, 194, 226–227, 334, 421, 470–471). Just before these evictions, Floorlady Gandy told two other floorladies to come with her to Foreman Williams' office, and during the struggling, Gandy watched from the office door with apparent glee (R. 147; J.A. 307).

The four evicted female employees complained to Plant Manager Byrd about their treatment (R. 147; J.A. 100–101, 151, 195, 227, 632–634). When West asked whether Byrd could make the plant workers behave so that the four could go back to work, Byrd replied, "No, I can't handle them * * * that's what you call a mob" (R. 147–148; J.A. 100, 195). Bell then asked whether she could return to work the following day, and Byrd answered that it would be at her own risk because he could not give her "any kind of protection in the plant" (R. 148; J.A. 100–101). He told the group that they should stay at home for their own protection, and that, if they would call from time to time, he would advise them when to return (R. 148; J.A. 101, 122, 634). The four women

left the plant and reported the incident to the local sheriff (R. 148; J.A. 123, 166–167, 218). On May 24, Byrd advised the group not to come to work for a few more days (R. 148; J.A. 101).

The next morning, May 25, the five evicted employees and Madden went to Byrd's office seeking to return to work. Byrd told them that they should lay off a few days longer as the women were still upset and he could offer them "no protection unless there is violence in the mill" (R. 148; J.A. 101–102, 196–197, 152–153). Byrd assured four of the employees that they still had jobs, but he discharged Estes and Madden, the former allegedly for wearing an ILG pin on May 23 and the latter allegedly for failing to make her production quota (R. 148–149, 18, 256, n. 5; J.A. 255–256, 272–273, 624).

On the morning of May 31, Chavers, Bell, Jones, and West reported for work at Byrd's office in accordance with his instructions (R. 149–150; J.A. 103–104, 197; 641). Byrd assigned Jones and Chavers to their old jobs but assigned West and Bell to operate sewing machines, so as to reduce their contact with other workers (J.A. 104, 229, 642). He cautioned all four that he wanted no discussion of unions in the plant[3] (R. 150; J.A. 105, 198, 154, 229, 641). Foreman Esk-

[3] On the previous day, Byrd had posted the following notice (R. 150; J.A. 641–642, 716):

> TO ALL EMPLOYEES:
>
> This is to refresh your memory of a previous notice posted on the bulletin board and to advise you that under no conditions are we to have any violence in the plant on the company property.

ridge attempted to escort Jones and Chavers to their work stations, but a group of about 25 women forced them through the door leading into the lobby (R. 151; J.A. 155–156, 230). Eskridge pulled open the door to Byrd's office and cried out, "Byrd, they are running [Jones] and [Chavers] out again, and Mary Alice Braddick started every darn bit of it" (R. 151; J.A. 105, 199, 643). Byrd sent the four ILG supporters home, and the other employees returned to work (R. 151; J.A. 643). Mary Alice Braddick was not reprimanded; in June, she was promoted to floorlady (R. 151, n. 54; J.A. 446).

On June 4, each of the four women employees wrote Byrd protesting that he had permitted the other employees to evict them from the plant; they also inquired when they could return to work and whether they would receive protection (R. 152; J.A. 717, 722, 724, 727). Three weeks later, on June 25, Byrd replied that they had "intentionally and wilfully provoked" the demonstrations against them and that, if they wished to work in the plant, they must "avoid the inciting of any further demonstrations" (R. 152–153; J.A. 645, 718–719, 725–726, 728). The four women returned to work on July 9, and there were no incidents on that day or the next (R. 154–155; J.A. 110). On July 11, West heard a fellow employee tell Floorlady Smith that "they were fixing to run us out again" (R. 155; J.A. 111). Floorlady Smith walked off, and 15 or 20 employees removed West and the three other newly returned employees from their work stations (R. 155–156;

J.A. 111, 160, 203, 233, 491–492). Floorladies Smith and Braddick watched the eviction but did nothing (R. 156; J.A. 204). Foreman Eskridge took Bell, Jones and Chavers to Byrd's office and told Byrd that they had not "done anything to cause the difficulty" (R. 156; J.A. 204, 161). Byrd replied, "I know they weren't causing any trouble," and asked the names of those who were in the offending group (R. 156; J.A. 161, 204–205). Byrd sent the ILG supporters home, promising that he would call them when he thought it advisable for them to return to work (R. 156; J.A. 161, 205, 235). He did not thereafter recall any of them (R. 156; J.A. 111–112, 162, 205).

On August 3, four more employees came to work wearing ILG pins (R. 157; J.A. 286, 307, 320, 337). Shortly thereafter, Byrd told them that wearing the pins could result in violence and that they must either take the pins off or go on layoff until sentiment in the plant had changed (R. 158; J.A. 730, 286–287). The four employees left the plant rather than remove their pins, but returned to work on August 16, without the pins. On that date, they were evicted from the plant by a group of employees (R. 160; J.A. 289–290, 322, 340, 428, 309). During the eviction, Floorladies Gandy, Smith, and Boddiford stood by watching and "snickering" (R. 160; J.A. 309–310, 326, 341).

The evicted workers reported what had happened to Byrd, who told them that their presence in the plant was causing the disturbance (R. 160; J.A. 310,

324–325) and that "[t]here wasn't anything he could do about it." He advised that, for their own protection, they stay home until the situation in the plant permitted their return (R. 161; J.A. 291, 341–342). One of the four evictees called Byrd early in November and asked when she might return, but Byrd said he had no idea (R. 161; J.A. 342). Byrd did not call the others (R. 161; J.A. 291, 311, 326).

No employees were punished for taking part in the evictions, although the names of those responsible were given to Byrd by the ILG adherents (R. 147, 156, 160; J.A. 100–101, 195, 161, 325), by supervisory personnel (R. 151; J.A. 105), and by participating employees (R. 162–163; J.A. 433–444, 438–439). Nor did Byrd interrogate the employees whose participation in the evictions was called to his attention (R. 163; J.A. 549–570; 399, 495, 511, 530–532).

C. THE DECISIONS BELOW

The Board concluded that the Company, by failing to take reasonable measures to prevent that action, had "ratified and condoned the forcible ejection of the ILG supporters, and had thus in effect caused them to be laid off or discharged on account of their ILG activity, in violation of Section 8(a)(3) and (1) of the Act" (R. 256–257). The Board ordered the Company to cease and desist from "failing to take all reasonable measures necessary to prevent supporters of [UGW] from evicting employees from its * * * plant because of their membership in, or support and

assistance to" another labor organization, and from discouraging membership in ILG by discriminatorily discharging or laying off any employee (R. 191). Affirmatively, the order requires the Company to reinstate the employees discriminated against with back pay (R. 192, 195). The court of appeals enforced the Board's order in full, stating that the evidence showed that the Company not only acquiesced in the evictions, but encouraged them (Pet. App. 15a).

ARGUMENT

The broad question which petitioner seeks to raise here (see Pet. 2) is not actually presented by this case. Whatever may be the obligation of an employer who is an innocent bystander to anti-union activity instigated by his employees, it is clear that an employer violates the Act where, as here, he sanctions and actively supports the use of violence as a means of thwarting union activities. *National Labor Relations Board* v. *Newton*, 214 F. 2d 472, 475 (C.A. 5); *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 954 (C.A. 6), certiorari denied, 336 U.S. 972; *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 664 (C.A. 5), certiorari granted, 317 U.S. 622, writ dismissed, 319 U.S. 776; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C.A. 6). Thus, the issue raised by the petition is, essentially, whether substantial evidence supports the Board's finding that the Company sanctioned the forcible ejections from its plant. The

court of appeals upheld the Board's finding, and there is no occasion for further review of this evidentiary issue. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In any event, in the light of the Company's widespread acts of restraint and coercion against ILG adherents (see Statement, *supra,* p. 3) and the course of conduct which it engaged in when the disturbances occurred (see the opinion of the court below, Pet. App. 15a), it is evident, as the court of appeals concluded, "that the Company not only failed to take adequate steps to prevent violence to supporters of the ILG but also that it actively encouraged such actions" (*ibid.*).[4]

Contrary to petitioner (Pet. 17–24), the decision below is not in conflict with any other decision. Most of the cases cited by petitioner involved employee animosities unrelated to union activities or provoked by unprotected conduct. The disturbances involved in *National Labor Relations Board* v. *P. R. Mallory & Co.,* 237 F. 2d 437 (C.A. 7), and *Porto Mills, Inc.,* 149 NLRB 1454, were related to union activities. In those cases, however, the court and the Board, respectively, found that—unlike the present situation—

[4] In this situation, it cannot properly be contended that the requirements of the Board's order are insufficiently clear (see Pet. 13–15). It is evident that the order requires the Company to cease its assistance and encouragement to those engaging in violence and to take appropriate measures to prevent such violence from recurring.

the employer had neither encouraged nor condoned the discriminatory conduct of the employees.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1966.

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[5] In *Mallory*, the Court found that the company had no knowledge that the employee in question was being ejected for non-membership in the union, and "it, like the union, gave no assistance either directly or indirectly to the group of employees who for some reason or other were hostile to her" (237 F. 2d at 446). In *Porto Mills*, the Board found that the company had refused to accede to the demand of the anti-union employees that the employee in question be discharged; rather he was discharged because of his refusal to cooperate in the company's efforts to resolve the dispute—*i.e.*, by taking a week off with pay until things "calmed down" (149 NLRB at 1455).

U.S. GOVERNMENT PRINTING OFFICE: 1966